IN THE

Supreme Court of the United States

October Term, 1978

No. 78-989

JOHN E. JONES,

Petitioner,

v.

CITY OF MEMPHIS, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JACK GREENBERG
JAMES M. NABRIT, III
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

WALTER L. BAILEY
Bailey, Higgs & Bailey
Tenoke Building
161 Jefferson
Memphis, Tennessee 38103

Counsel for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-

JOHN E. JONES,

Petitioner,

v.

CITY OF MEMPHIS, et al.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner John E. Jones respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 19, 1978.

OPINIONS BELOW

The September 19, 1978, opinion of the court of appeals, which is not yet officially reported, is set out in the Appendix hereto, pp. 23a-27a.

The May 28, 1976, order of the district court is set out at pp. 1a-2a of the Appendix. The July 28, 1977, decision of the district court, which is not reported, is set out at pp. 5a-7a of the Appendix. The district court's decision and order of August 5, 1977, which is not reported, is set out at pp. 8a-9a of the Appendix. The district court's order of August 8, 1977, which is not reported, is set out at p. 10a of the Appendix. The district court's decision of August 29, 1977, which is not reported, is set out at pp. 12a-20a of the Appendix. The October 13, 1977, order of the court of appeals permitting the taking of an interlocutory appeal, which is not reported, is set out at pp. 21a-22a of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1978. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Should the principle of respondeat superior be applied to an action to enforce the Fourteenth Amendment brought under 28 U.S.C. §1331?

STATUTORY PROVISION INVOLVED

Section 1331(a), 28 U.S.C., provides:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exeeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, Laws, or treaties of the United States.

STATEMENT OF THE CASE

This action was commenced on March 11, 1976, in the United States District Court for the Western District of Tennessee. The complaint alleged that, in violation of the Fourteenth Amendment, plaintiff had been arrested without any lawful cause and had been viciously beaten by several police officers in the Memphis city jail. The complaint further asserted that the injuries caused by that assault were so severe that plaintiff was hospitalized, required several operations, and was permanently scarred and disfigured. Plaintiff sought damages to compensate him, inter alia, for the medical costs incurred and for losses sustained during the period when his hospitalization prevented him from working.

The complaint named as defendants the City of Memphis and an indeterminate number of John Doe police officers. Because the identities of the officers who had inflicted the injuries was not known, plaintiff did not identify them by name, although the complaint sought leave to do so should their identity become known. The complaint also alleged that, in arresting and beating plaintiff, the officers had acted "within the course and scope of their employment."

Plaintiff asserted, inter alia, that these facts stated a cause of action directly under the Fourteenth Amendment, and that jurisdiction over that claim was conferred by 28 U.S.C. §1331. The defendant city moved to dismiss the complaint for failure to state a claim on which relief could be granted. The district court, on May 28, 1976, denied that motion, and expressly upheld jurisdiction under the Fourteenth Amendment and section 1331. 1a-2a.

Following additional briefing requested by the district court, the court on July 28, 1977, noting that the sole basis for the suit against the city was the allegation that the officers had

acted in the course of their employment, tentatively concluded that the doctrine of respondeat superior could not be used to establish municipal liability. 5a-7a. On August 5, 1977, the court therefore directed dismissal of the action against the city. 8a. On August 8, 1977, however, the district court vacated its order of dismissal. 10a. Finally, on August 29, 1977, the district court issued an opinion holding that the principle of respondeat superior could be used to establish municipal liability in an action to enforce the Fourteenth Amendment brought under 28 U.S.C. §1331. In order to enable the defendant to seek an interlocutory appeal from that ruling, the district court certified that the applicability of respondeat superior presented "a controlling question of law as to which there is substantial ground for difference of opinion." 12a-20a.

On October 13, 1977, the court of appeals authorized an interlocutory appeal under 28 U.S.C. §1292(b). It found that the applicability of respondeat superior to actions under the Fourteenth Amendment involved "a controlling question of law

as to which there are substantial grounds for differences of opinion." On September 19, 1976, the court of appeals held that the principle of respondeat superior could not be applied to establish municipal liability in such actions. Accordingly the Sixth Circuit remanded the case with directions to dismiss the complaint against the City of Memphis. 21a-22a.

REASONS FOR GRANTING THE WRIT

The issue on which the court of appeals' decision turned in this case is the same as the issue now pending before this Court in County of Los Angeles v. Davis, No. 77-1553 -- whether all federal civil rights guarantees must be construed in pari materia to afford the same rights and remedies. In the instant case the Sixth Circuit properly concluded that a city could be sued directly under the Fourteenth Amendment in light of Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), but felt compelled to reject the respondeat superior rule in such actions because of Monell v. Department of Social Services, 56 L.Ed.2d 611 (1978). Monell

had held that the use of respondeat superior in litigation under 42 U.S.C. §1983 would be inconsistent with the legislative history of section 1983. The Sixth Circuit in this case reasoned:

> Monell, which of course was not available to the district judge at the time of his decision, is conclusive of the respondeat superior issue in the present case. It would be incongruous to hold that the doctrine of respondeat superior can be invoked against a municipality in an action under 28 U.S.C. §1331, when the doctrine has no application in an action under 42 U.S.C. §1983.

p. 26a.

The decision below is squarely contrary to two well established lines of decisions by this Court. First, this Court has repeatedly held that the scope of actions permissible under section 1331, first enacted in 1875, need not be the same as that under other federal statutes of the same era. In Lynch v. Household Finance Corp., 405 U.S. 538, 546-550 (1972), the Court held the remedies available under section 1983 should not be limited to those involving the kinds of inter-

ests over which section 1331 provided jurisdiction.[1/] Similarly, Powell v. McCormack, 395 U.S. 486, 514-16 (1969), held that suits could be brought under section 1331 regarding the seating of Congressmen even though such actions had been expressly excluded from the scope of the Force Act of 1870.[2/]

Second, this Court has rejected attempts to read into federal civil rights statutes limitations based on other civil rights statutes, reasoning instead that the multiplicity of civil rights laws reflects a congressional intent to

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1/ The Court reasoned that different remedies seemed appropriate under sections 1331 and the 1871 Civil Rights Act, the predecessor of 42 U.S.C. §1983 and 28 U.S.C. §1343(3), because there were differences in coverage apparent on the face of those provisions. "[T]he supposed conflict between §§1343(3) and 1331 simply does not exist. Section 1343(3) applies only to alleged infringements of rights 'under color of . . . State law' whereas §1331 contains no such requirement. Thus, for example, in suits against federal officials for alleged deprivations of constitutional rights, it is necessary to satisfy the amount-in-controversy requirement for federal jurisdiction." 405 U.S. at 547.

2/ 16 Stat. 146. This statute is now 28 U.S.C. §1344.

provide "independent administrative and judicial remedies." Johnson v. Railway Express Agency, 421 U.S. 454, 459-61 (1975); Runyon v. McCrary, 427 U.S. 160, 173, n.10 (1976) (private club exemption of 1964 Civil Rights Act not read into 1866 Civil Right Act); see also Jones v. Alfred Mayer Co., 392 U.S. 409, 417, n.20 (1968).

The decision below is, as the Sixth Circuit itself noted, p. 27a., squarely in conflict with the decision of the District of Columbia Circuit in Dellums v. Powell, 566 F.2d 216 (D.C.Cir. 1977). Dellums, a Bivens action to redress violations of the First and Eighth Amendments by police officers, awarded damages against the District of Columbia based on the principle of respondeat superior. 566 F.2d at 220-225. The court of appeals in Dellums expressly rejected the argument that, in view of the limitations on section 1983 actions, "it would be anomalous" to give a broader scope to a Bivens action, 566 F.2d at 223, and upheld "the need and wisdom of respondeat superior liability for constitutional torts." 566 F.2d at 225.

The district courts are similarly divided. Nine decisions apply the principle of respondeat

superior in determining when a city should be held responsible for constitutional violations by its employees.[3] Three decisions have held that, although the federal courts have broad powers to hold a city liable for employee misconduct, they should only do so on a showing of "extraordinary" circumstances.[4] One decision holds that municipal liability should be limited to cases of misconduct by "high elected or appointed officials."[5] Two decisions which hold that a

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3/ Culp v. Devlin, 437 F.Supp. 20, 23-24 (E.D. Pa. 1977); Santiago v. City of Philadelphia, 435 F.2d 136, 148-49 (E.D. Pa. 1977); Spencer v. Town of Westerly, 430 F.Supp. 636, 638 (D.R.I. 1977); Sanabria v. Village of Monticello, 424 F.Supp. 402, 410-11 (S.D.N.Y. 1976); Clark v. State of Illinois, 415 F.Supp. 149, 151-54 (N.D. Ill. 1976); Sifrin v. Wilson, 412 F.Supp. 1282 (D.D.C. 1976); Collum v. Yurkovich, 409 F.Supp. 557, 558-59 (N.D. Ill. 1975); Williams v. Brown, 398 F.Supp. 155, 158-60 (N.D. Ill. 1975); Thomas v. Johnson, 295 F.Supp. 1025, 1032-33 (D.D.C. 1968).

4/ Weiss v. J.C. Penny, 414 F.Supp. 52, 54 (N.D. Ill. 1976); Gresham v. City of Chicago, 405 F.Supp. 410, 412 (N.D. Ill. 1975); Jamison v. McCurrie, 388 F.Supp. 990, 993-94 (N.D. Ill. 1975).

5/ Adekalu v. New York City, 431 F.Supp. 812, 820 (S.D.N.Y. 1977). This rule was considered but ultimately rejected in Crosley v. Davis, 426 F.Supp. 389, 393, n.11 (E.D. Pa. 1977).

city can never be sued under §1331 contain dicta suggesting that, if such suits were possible, respondeat superior principles should not be applied, but neither suggests what principles ought be applied instead in determining whether to hold a city liable for employee misconduct.[6]

The reasoning of the court of appeals in this case is both unsound and unworkable. The scope of a constitutional action under section 1331 cannot be determined simply by recourse to another civil rights statute because there are several other civil rights statutes which often establish clearly inconsistent standards. Thus while respondeat superior does not apply in section 1983 cases, it does apply under Title VII of the 1964 Civil Rights Act[7] and under Title VIII of the 1968 Civil Rights Act.[8] It is no more "incongru-

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6/ Jones v. McElroy, 429 F.Supp. 848, 864 (E.D. Pa. 1977); Smetanka v. Borough of Ambridge, 378 F.Supp. 1366, 1376 n.2 (W.D. Pa. 1974).

7/ Reyes v. Matthews, 428 F.Supp. 300, 301 (D.D.C. 1976); Williamson v. Saxbe, 11 EPD ¶10,840, p. 7526 (D.D.C. 1976).

8/ Marr v. Rife, 503 F.2d 735, 740-42 (6th Cir. 1974); United States v. Northside Realty Associ-

ous" that an action under section 1331 should differ from one under section 1983 than that it should differ from actions under Title VII or Title VIII. Second, although jurisdiction over this cause of action exists under section 1331, the applicability of respondeat superior must turn on the provision creating the cause of action itself, in this case the Fourteenth Amendment. Whatever the relevance to civil rights statutes of the principle of in pari materia, it cannot be used to place on the Constitution a restrictive construction based on a subsequently enacted statute.

Bivens holds that a constitutional violation should be redressed by any "remedial mechanism normally available in federal court." 403 U.S. at 397. Respondeat superior was when the Fourteenth Amendment was adopted, and remains today, the rule ordinarily used by federal and state courts in determining whether an employer should be held liable when an employee violated a statutory or common law duty of care. See e.g., Stockwell v.

8/ cont'd
ates, Inc., 474 F.2d 1164, 1168 (5th Cir. 1973), cert. denied 424 U.S. 977 (1974); Jeanty v.McKey & Poague, Inc., 496 F.2d 1119, 1120-21 (7th Cir. 1974).

United States, 12 Wall. (80 U.S.) 531 (1871).9/ The principle of respondeat superior, which this Court characterized in 1852 as "of universal application",10/ is particularly appropriate in an action arising under the Fourteenth Amendment since the conduct of the police officers only constituted a violation of the Amendment because they were clothed with the authority of the City.

> The Amendment . . .[was] not aimed at rightful state action. Abuse of state power was the target. Limits were put to state authority, and states were forbidden to pass them, by whatever agency. It is too late now . . . to question that in these matters abuse binds the state and is its act, when done by one to whom it has given power to make the abuse effective to achieve the forbidden ends. Vague ideas of dual federalism, of ultra vires doctrine imported from private agency, and of want of finality in official action, do not nullify what four years of civil strife secured. . . . Screws v. United States, 325 U.S. 91, 115-16 (1945) (Rutledge, J. concurring) (emphasis added).

9/ In Panama R.R. Co. v. Boose, 249 U.S. 41 (1919), Justice Holmes, writing for the Court, insisted that "whatever may be thought of the unqualified principle that a master must answer for the torts of his servant committed within the scope of his employment, probably there are few rules of the common law so familiar to all, educated and uneducated". 249 U.S. at 45.

10/ Philadelphia, etc., R.R. Co. v. Derby, 14 How. (55 U.S.) 468, 486.

To hold otherwise in this case, and to leave petitioner withut redress because the offending officers succeeded in withholding their identities, would break the promise of Bivens that "where federally protected rights have been invaded, . . . courts will be alert to adjust their remedies so as to grant necessary relief." 403 U.S. at 392.

Whether federal civil rights guarantees must be construed to provide similar or identical rights and remedies is a central issue in County of Los Angeles v. Davis, No. 77-1553. There the question is whether the "effect" standard of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-2(a), should be read into section 1 of the 1866 Civil Rights Act, 42 U.S.C. §1981. In County of Los Angeles the respondents have urged that "all acts in pari materia are to be taken together, as if they were one law", and that unless Title VII and section 1981 are given the same construction there would be "inconsistency, confusion and uncertainty in the law."[11/] Petitioners there

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11/ Brief for Respondents, No. 77-1553, pp. 24, 27.

contend that these are "separate, distinct and independent statutes affording different, albeit to some extent related, rights and remedies", relying, as do we, on Johnson v. Railway Express Agency and Jones v. Alfred Mayer Co.[12/] In view of the similarity of the issues involved, it might be appropriate to defer action on the instant petition until there is a decision in County of Los Angeles.

CONCLUSION

For the above reasons a Writ of Certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

WALTER L. BAILEY
Bailey, Higgs & Bailey
Tenoke Building
161 Jefferson
Memphis, Tennessee 38103

Counsel for Petitioner

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CIVIL C-76-99

JOHN E. JONES,

Plaintiff,

- vs -

CITY OF MEMPHIS, TENNESSEE
and JOHN DOES,

Defendants.

ORDER DENYING MOTION TO DISMISS

This case is before the court on a motion to dismiss filed on behalf of the defendant, City of Memphis. The plaintiff has filed its brief in opposition.

Defendant argues that the City of Memphis is not a person within the meaning of the Civil Rights Act and thus is not subject to suit in the case at bar. The plaintiff, however, does not base his cause of action against the City on the Civil Rights Act but rather on the Fourteenth Amendment to the Constitution. Plaintiff also

alleges and for purposes of this motion we accept as true, that the amount in controversy exceeds ten thousand dollars. It is now settled law that such allegations are sufficient to come within the 28 U.S.C. §1331 jurisdiction of the district court.

Defendant also argues that the pleadings are insufficient and vague with regard to times and places and the complaint is too vague as to defendant's participation in the acts alleged. These arguments are not sufficient to cause the dismissal of the complaint. Defendant may avail itself of the various discovery devices to get to the roots of plaintiff's claims.

Defendant finally argues that the City of Memphis is not liable for torts committed by its police officers under the doctrine of governmental immunity. After due consideration we conclude that this argument also has no merit.

Accordingly, defendant's motion to dismiss shall be denied.

It is so ORDERED.

ENTERED this 28 day of May, 1976.

Bailey Brown /s/
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CIVIL C-76-99

JOHN E. JONES,

Plaintiff,

- vs -

CITY OF MEMPHIS, TENNESSEE
et al.,

Defendants.

ORDER CONTINUING CASE
AND REQUIRING MEMORANDA

In this case, it appearing to the court that neither plaintiff nor defendant have filed pre-trial memoranda as required by the rules of this court, the case is continued and will be reset.

Within fifteen (15) days, counsel for both sides of this controversy will file memoranda of points and authorities which will include the following points of law:

1. Under what circumstances can the City of Memphis be liable for alleged tortious acts of its

policemen under the Fourteenth Amendment and 28 U.S.C. §1331.

2. To what extent does the City have a defense against this claim on the theory that its claim for indemnity against the wrongdoing policemen would be barred by the statute of limitations.

Bailey Brown /s/
Chief Judge Bailey Brown

Dated: 7-7-77

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CIVIL C-76-99

JOHN E. JONES,

Plaintiff,

- vs -

CITY OF MEMPHIS, TENNESSEE
and JOHN DOES,

Defendants.

MEMORANDUM DECISION

In this case, it is the contention of the City of Memphis that this cause should be dismissed for the reason that it does not state a claim for relief with respect to the City.

This court is satisfied that it has jurisdiction under 28 U.S.C. §1331 since the cause of action alleged is grounded in the Fourteenth Amendment. However, we conclude that the complaint does not state a claim for relief against the City since the only theory of liability

asserted is that based on the doctrine of respondeat superior. It is contended, in short, that the City would be liable to the plaintiff because, it is alleged, that certain unknown officers physically harmed him after his arrest, then acting within the scope and course of their employment. We conclude that, by analogy with the cases holding that a superior officer on a police force cannot be liable under §1983 of Title 42 on the doctrine of respondeat superior, a City cannot be liable under this theory on a claim grounded in the Fourteenth Amendment as to which jurisdiction is asserted under §1331. See Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1973). See also Fanburg v. Chattanooga, 330 F.Supp. 1047 (E.D. Tenn. 1968).

The defendant also makes a separate contention that the City of Memphis could not be liable to the plaintiff because the statute of limitations has barred any claim plaintiff might have had against the unknown policeman who allegedly beat him and that therefore, since the policeman could not be liable to the plaintiff, his employer, the defendant City, could not be liable to

him. Since it is not necessary for this court to rule on such proposition, we do not do so.

Counsel for plaintiff submitted a memorandum, but as pointed out in a letter from the court to counsel, such memorandum did not cover the issues herein dealt with and in which the court was interested. Unless counsel for plaintiff files a second memorandum dealing with these issues within one week, an order will be entered directing the Clerk to enter a final judgment dismissing this action. If plaintiff does file such a memorandum, we will reconsider this matter and make a decision as to whether this action should be dismissed.

ENTERED this 28th day of July, 1977

Bailey Brown /s/

CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CIVIL C-76-99

JOHN E. JONES,

Plaintiff,

- vs -

CITY OF MEMPHIS, TENNESSEE
and JOHN DOES,

Defendants.

MEMORANDUM DECISION AND ORDER FOR JUDGMENT

Following our memorandum decision of July 28, 1977, counsel for plaintiff filed a memorandum on August 2, 1977 addressed to the question whether the City of Memphis could be liable to the plaintiff on a theory of respondeat superior as a result of its unknown police officers having beat him while in the course of their employment. It is not contended by plaintiff that there is any other theory of liability with respect to the

City. After considering plaintiff's emmorandum. we still are of the opinion, as set out in our memorandum decision of July 28, 1977, that the City would have no liability under these circumstances.

It is therefore ORDERED that the action be dismissed, and the Clerk will enter a judgment to such effect.

ENTER this 5th day of August, 1977.

Bailey Brown /s/

CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CIVIL C-76-99

JOHN E. JONES,

Plaintiff,

- vs -

CITY OF MEMPHIS, TENNESSEE
and JOHN DOES,

Defendants.

ORDER STRIKING MEMORANDUM DECISIONS
- and -
ORDER SETTING ASIDE JUDGMENT

It appearing to the court that the issues presented in the captioned case on the motion to dismiss are of great importance and the court desires more fully to deal with such issues, it is ORDERED that the memorandum decisions entered on July 28, 1977 and August 5, 1977 be and they are hereby stricken and the judgment entered

pursuant thereto on August 8, 1977 be and it is hereby set aside.

ENTER this 8th day of August, 1977.

Bailey Brown /s/

CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CIVIL C-76-99

JOHN E. JONES,

Plaintiff,

- vs -

CITY OF MEMPHIS, TENNESSEE
and JOHN DOES,

Defendants.

MEMORANDUM DECISION

In this case, plaintiff John E. Jones seeks damages against the City of Memphis and certain John Doe police officers who allegedly deprived Jones of his constitutional right by illegally arresting him and beating him in the course of their employment for the City. The John Doe officers have never been identified.

Jones seeks to invoke the jurisdiction of this court both under the provisions of 42 U.S.C. §§1981, 1983 and 28 USC 1343, and under the general federal question jurisdiction provided by 28 USC §1331.

It is clear that no cause of action arises under §1983 against the City, which is not a "person" within the meaning of that section. Monroe v. Pape, 365 U.S. 167 (1961); City of Kenosha v. Bruno, 412 U.S. 507 (1973). Moreover, the Supreme Court has held that a municipality may not be subjected to vicarious liability on a claim arising under §1983. Moor v. County of Alameda, 411 U.S. 693 (1973).

A §1981 claim may be brought against a municipality in a proper case. United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977); United States ex rel Washington v. Chester County Police Dept., 300 F.Supp. 1279 (E.D. Penn. 1969).

However, §1981 was enacted under the Congressional power derived from §2 of the Thirteenth Amendment to identify and eliminate through legislation the badges and incidents of slavery. Sec. 1981 therefore is applicable to cases of racial discrimination with regard to certain rights enumerated in the statute. Runyon v. McCrary, 427 U.S. 160 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

Following the Supreme Court's recognition that §1981 is addressed specifically to the problem of racial discrimination, the federal courts have held that an allegation of racial discrimination is an essential element of a cause of action under §1981. Agnew v. City of Compton, 239 F.2d 226 (9th Cir. 1956), cert. den. 353 U.S. 959 (1957); Veres v. County of Monroe, 364 F.Supp. 1327 (E.D. Mich. 1973), aff'd, 542 F.2d 1177 (6th Cir. 1976). In the present case, plaintiff Jones alleges in his complaint that he is "racially black." He fails, however, to allege that the claimed misconduct of the John Doe officers was related in any way to racial discrimination. Therefore, no claim under §1981 is asserted by the complaint.

Although the complaint fails to state a claim under 42 USC §§1981 and 1983, this court does have jurisdiction under 28 USC §1331 over claims arising under the Constitution and laws of the United States, where the claim meets the $10,000 jurisdictional amount required.

The Supreme Court noted the possibility of §1331 jurisdiction over constitutional claims

against a municipality in City of Kenosha v. Bruno, supra. In that case, the Court held that no §1983 claim could be stated against the city, but remanded in order to allow the district court to consider the availability of §1331 jurisdictin over the claims, which alleged a deprivation of rights guaranteed by the Fourteenth Amendment. 412 U.S. at 513-514.

The Sixth Circuit subsequently held that a claim for damages against a municipality based on alleged unconstitutional searches could be brought under the jurisdictional aegis of §1331 even though no §1983 claim could arise as against the City. The court held that the substantive cause of action arose directly under the Constitution, under the authority of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and that jurisdiction was available under §1331. Hanna v. Drobnick, 514 F.2d 393, 398 (6th Cir. 1975). See Wiley v. Memphis Police Dept., 548 F.2d 1247 (6th Cir. 1977); Amen v. City of Dearborn, 532 F.2d 554 (6th Cir. 1976).

In the present case, Jones has alleged violations of his rights under the First, Fourth,

Fifth and Fourteenth Amendments of the Constitution. Thus, this case arises under the Constitution and laws of the United States. The complaint fairly alleges damages well in excess of $10,000. Therefore, this court has jurisdiction under 28 USC §1331.

This court has had opportunity to reconsider the question whether a municipality may be held liable under the doctrine of respondeat superior on a Fourteenth Amendment claim brought under the jurisdictional provision of §1331.

It has been widely held that actions under the Civil Rights Act of 1871 are not maintainable on a theory of respondeat superior against superior officers who have neither caused nor participated in the alleged deprivations of constitutional rights committed by subordinates. Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1973); Adams v. Pate, 445 F.2d 105 (7th Cir. 1971); Moore v. Buckles, 404 F.Supp. 1382 (E.D. Tenn. 1975); Knipp v. Weikle, 405 F.Supp. 782 (N.D. Ohio 1975). The Jennings case explained this rule by noting that the doctrine of respondeat superior is justified by the notion that an enterprise which

creates risks is in a better position to absorb and distribute the costs of those risks than is an innocent victim. Since the cost allocation rationale is inapplicable to superior officers, the rule of respondeat superior should not be applied to them.

The reasoning of Jennings does not suggest that the doctrine of respondeat superior should not be applied to a city whose servants commit violations of civil rights. In fact, the court noted there that "It is the city who set the enterprise in motion, who "profits" from the appellees' labor and who, if held liable in such instances, can by its powers of taxation spread the resulting expenditures amongst the community at large." 476 F.2d at 1274.

Thus, even if this court applied the rules of respondeat superior developed in actions under the Civil Rights Act of 1871 to this Bivens-style action, defendant City of Memphis would remain subject to liability on a respondeat superior theory.

Defendant's contention that this action is barred by the statute of limitations is without

merit. The rule in Tennessee is that where liability of the master is predicted solely on the doctrine of respondeat superior, an injured party barred from recovering against the servant is barred from recovering against the master as well. Thus, where a covenant not to sue has been executed with the servant, the master may not be held liable on respondeat superior. Craven v. Lawson, 534 S.W.2d 653 (1976); Stewart v. Craig, 344 S.W.2d 761 (1961). See Terry v. Memphis Stone and Gravel Co., 222 F.2d 652 (6th Cir. 1955), applying the Tennessee rule. Similarly, where an action against the servant would be barred by a rule of intrafamily immunity, the master cannot be held liable on respondeat superior. Smith v. Henson, 381 S.W.2d 892 (1964); Graham v. Miller, 187 S.W.2d 622 (1945).

The present action agains the City of Memphis was filed prior to the expiration of Tennessee's one year statute of limitations. At that time, an action could also have been maintained against the John Doe police officers, had plaintiff Jones been able to find them. Jones has never executed a release or covenant not to sue with regard to the

officers. Thus, even if the Tennessee rule should be applied to this federal cause of action, Jones is entitled to maintain his action against the City.

For the reasons stated above, Jones' claims should be and they are hereby dismissed only to the extent they are asserted under 42 USC §§1981 and 1983. Because Jones' complaint does allege facts sufficient to state a Bivens-style cause of action for deprivation of his constitutional rights, over which this court has jurisdiction under §1331, this action is not dismissed.

It is so ORDERED.

CERTIFICATION PURSUANT TO TITLE 28, SEC. 1292(b)

Since Monroe v. Pape, 365 U.S. 167, it has been settled law that a municipal corporation can have no liability under Title 42 USC, Sec. 1983. However, it is now pretty clear that a municipal corporation can be liable where the claim is based directly on the Fourteenth Amendment and further that Title 18 USC, Sec. 1331 (federal question) may be relied upon for jurisdiction. In denying the motion to dismiss in the instant case, this

court had to deal with the additional question whether a municipal corporation (the City of Memphis) could so be liable only on the basis of respondeat superior. (There is no allegation that the City was negligent in hiring the policemen and no allegation that the City condoned such misconduct as is alleged here.) This is a very important question as to which there is not, so far as the court knows, any square holding in the appellate courts. This court concluded, though with considerable doubt, that the City can be liable on the basis of respondeat superior. Accordingly, this court is of the opinion that this order denying the motion to dismiss presents a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation.

ENTER this 29 day of August, 1977

Bailey Brown /s/

CHIEF JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-8109

JOHN E. JONES,

Plaintiff-Respondent

- vs -

CITY OF MEMPHIS, TENNESSEE
AND JOHN DOES,

Defendants-Petitioners

ORDER

This cause is before the Court on a petition for permission to appeal pursuant to 28 U.S.C. §1292(b) and Rule 5, Federal Rules of Appellate Procedure, from an order of the Western District of Tennessee finding that a municipality (the City of Memphis) may be found to be liable for the alleged misconduct of its employees on the basis of respondeat superior in a civil rights action brought pursuant to 28 U.S.C. §1331 and under authority of Biven v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

This Court has reviewed the petition and response thereto and is of the opinion that the ordr appealed from presents a controlling question of law as to which there are substantial grounds for differences of opinion, i.e., Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1973) and Dellums v. Powell, Chief of United States Capitol Police, et al., No. 75-1975 (D.C. Cir. August 4, 1977), and that an immediate appeal from the order may materially advance the ultimate termination of this litigation.

It appearing that the petitioner has satisfied the standards which must be met before such an appeal will be permitted, Cardwell v. Chesapeake and Ohio Railroad Co., 504 F.2d 444 (6thCir. 1974),

It is ORDERED that the petition for permission to appeal be and it hereby is granted.

ENTERED BY ORDER OF THE COURT

DATED: October 10, 1977

JOHN P. HEHMAN /s/

Clerk

No. 77-1704

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN E. JONES,
Plaintiff-Appellee,
v.
CITY OF MEMPHIS, TENNESSEE, ET AL.,
Defendants-Appellants.

APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed September 19, 1978.

Before PHILLIPS, Chief Judge, KEITH, Circuit Judge, and PECK, Senior Circuit Judge.

I.

PHILLIPS, Chief Judge. The issue in this case is whether a municipality can be held liable for the misconduct of its employees under the doctrine of *respondeat superior* in a civil rights action brought directly under the fourteenth amendment and the general federal question statute, 28 U.S.C. § 1331. John E. Jones, appellee, filed this suit against the City of Memphis and certain John Doe police officers who, in the course of their employment, allegedly deprived appellee of his constitutional rights by illegally arresting and beating him.

In an unpublished memorandum decision on a motion to dismiss the complaint, the district court found initially that a municipal corporation can be held liable on a claim based

directly on the fourteenth amendment and 28 U.S.C. § 1331. The district court concluded, although with "considerable doubt", that the City could be held liable under the doctrine of *respondeat superior*. The district court denied the motion to dismiss and ruled that the issue of the applicability of *respondeat superior* "presents a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation." In an unpublished order, this court granted leave to appeal pursuant to 28 U.S.C. § 1292(b).

We reverse and hold that the tort doctrine of *respondeat superior* does not apply to actions brought against a municipal corporation directly under the fourteenth amendment and § 1331.

II.

Prior to the Supreme Court's recent pronouncement in *Monell* v. *Department of Social Services*, — U.S. —, 46 U.S.L.W. 4569 (June 6, 1978), that Court held that municipalities were immune from liability under 42 U.S.C. § 1983. In *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961), overruled in part by *Monell*,[1] the Supreme Court held that "Congress did not undertake to bring municipal corporations within the ambit of [§ 1983]." Specifically, the court in *Monroe* held that the word "person" in 42 U.S.C. § 1983 does not include municipalities. In *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973), the Court reaffirmed the *Monroe* ruling but remanded the case to the district court to consider "the availability of [28 U.S.C.] § 1331 jurisdiction. . . ." 412 U.S. at 514.

[1] *Monell* overruled *Monroe* insofar "as it holds that local governments are wholly immune from suit under § 1983." The Court affirmed that portion of *Monroe* which holds:

> [T]hat the doctrine of *respondeat superior* is not a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees. 46 U.S.L.W. at 4571 & n. 7.

Although *Monroe* barred litigants from bringing actions against municipalities under § 1983, many courts interpreted this language in *Kenosha* as support for the position that jurisdiction over municipalities in civil rights actions could be obtained under § 1331. *See, e.g., Mahone* v. *Waddle*, 564 F.2d 1018, 1022 (3d Cir. 1977); *Gentile* v. *Wallen*, 562 F.2d 193, 196 (2d Cir. 1977); *Hostrop* v. *Board of Junior College District No. 515*, 523 F.2d 569, 577 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976); *Gray* v. *Union County Intermediate Education District*, 520 F.2d 803, 805 (9th Cir. 1975); *Bosely* v. *City of Euclid*, 496 F.2d 193, 195 (6th Cir. 1974).

This Circuit has held consistently that a direct cause of action under 28 U.S.C. § 1331 for violation of constitutional rights is available against a municipality. *See Gordon* v. *City of Warren*, No. 76-2204, slip op. at 8-11, — F.2d — (6th Cir. June 26, 1978); *Wiley* v. *Memphis Police Department*, 548 F.2d 1247, 1254 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977); *Amen* v. *City of Dearborn*, 532 F.2d 554, 559 (6th Cir. 1976); *Hanna* v. *Drobnick*, 514 F.2d 393, 398 (6th Cir. 1975); *Bosely* v. *City of Euclid, supra*, 496 F.2d at 195; *Foster* v. *City of Detroit*, 405 F.2d 138, 144 (6th Cir. 1968); *Foster* v. *Herley*, 330 F.2d 87, 91 (6th Cir. 1964).

At least six other circuits have reached this conclusion, based upon the teachings of *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See Turpin* v. *Mailet*, — F.2d —, No. 77-7345 (2d Cir. June 5, 1978) (en banc); *Owen* v. *City of Independence*, 560 F.2d 925, 932-34 (8th Cir. 1977), *petition for cert. pending; McDonald* v. *Illinois*, 557 F.2d 596, 604 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977); *Kite* v. *Kelley*, 546 F.2d 334, 337 (10th Cir. 1976); *Davis* v. *Passman*, 544 F.2d 865, 873 (5th Cir. 1977); *Cox* v. *Stanton*, 529 F.2d 47, 50-51 (4th Cir. 1975). *See also Gray* v. *Union County Intermediate Education District, supra*, 520 F.2d at 805. *Cf. Gagliardi* v. *Flint*, 564 F.2d 112, 114-16 (3rd Cir. 1977), *petition for cert. pending; Kostka* v. *Hogg*, 560 F.2d 37, 41 n. 5 (1st Cir. 1977).

III.

The only issue on this appeal is whether the doctrine of *respondeat superior* should be applied to actions against municipalities brought directly under the fourteenth amendment and § 1331. Appellee has not contended that the City of Memphis was negligent in failing to provide proper training and supervision of the police officers who allegedly violated appellee's constitutional rights. Nor has appellee argued that the City ratified or condoned the alleged misconduct.

In *Monell* the Supreme Court said:

> [T]he language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor — or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory. 46 U.S.L.W. at 4578.

We conclude that the rationale of *Monell*, which, of course was not available to the district judge at the time of his decision, is conclusive of the *respondeat superior* issue in the present case. It would be incongruous to hold that the doctrine of *respondeat superior* can be invoked against a municipal corporation in an action under 28 U.S.C. § 1331, when the doctrine has no application in an action under 42 U.S.C. § 1983. Under neither statute, in our opinion, can a municipality be held culpable *solely* because it employs a tortfeasor.

Even if we were without the guidance of *Monell* concerning the scope of municipal liability for deprivation of civil rights, we would hold that the doctrine of *respondeat superior* is inapplicable in the present case. The day before *Monell* was rendered, the Second Circuit, sitting en banc, rejected the application of *respondeat superior* in fourteenth amendment actions against municipalities. In *Turpin* v. *Mailet*, *supra*,

slip op. at 3265,[2] the court stated: "The clear intendment of *Bivens* [*Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)] is that those directly responsible for unconstitutional behavior may be called to task for their wrongful acts." The court reasoned that to impose liability on a municipality under the theory of *respondeat superior* would be "fundamentally inconsistent with the import of *Bivens*." Slip op. at 3270.

See also Nix v. *Sweeney*, 573 F.2d 998, 1003 (8th Cir. 1978); *Jamison* v. *McCurrie*, 565 F.2d 483 (7th Cir. 1977); *Kostka* v. *Hogg*, *supra*, 560 F.2d at 43-44. *But see Dellums* v. *Powell*, 566 F.2d 216 (D.C. Cir. 1977).

Appellee's cause of action against the City of Memphis is premised solely on the fact that the police officers were employed by the City and were acting within the scope of their employment when they allegedly violated appellee's constitutional rights. Our holding is that a municipality sued directly under the Constitution and § 1331 cannot be held liable for the constitutional torts of its agents on the basis of *respondeat superior* under the averments of the complaint in this case.

We recognize that the scope of municipal liability enunciated by the Second Circuit in *Turpin* may not be identical to the extent of municipal liability indicated by the Supreme Court in *Monell*. We express no views in this opinion as to the "full contours of municipal liability." *Monell*, 46 U.S.L.W. at 4579. In *Monell*, the Supreme Court said: "[W]e expressly leave further development of this action to another day." *Id.*

For the reasons set forth in this opinion, we hold that the City of Memphis cannot be held liable in an action brought under the Constitution and § 1331 on the sole basis of *respondeat superior*. The decision of the district court is reversed and the case remanded with directions to dismiss the complaint against the City of Memphis.

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[2] This opinion likewise was not available to the district judge at the time of his decision.

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-989

JOHN E. JONES,
Petitioner,

vs.

CITY OF MEMPHIS, TENNESSEE,
and JOHN DOES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CLIFFORD D. PIERCE, JR.
City Attorney
Room 314 City Hall
125 North Main St.
Memphis, Tennessee 38103
Counsel for Respondents

Of Counsel:

HENRY KLEIN
Staff Attorney
Suite 3500 100 N. Main Bldg.
Memphis, Tennessee 38103

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-989

JOHN E. JONES,
Petitioner,

vs.

CITY OF MEMPHIS, TENNESSEE,
and JOHN DOES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' RESTATEMENT OF THE QUESTION PRESENTED

1. Whether a municipality can be held liable for the misconduct of its employees under the doctrine of *respondeat superior* in a civil rights action brought directly under the Fourteenth Amendment and the general federal question statute, 28 U.S.C. §1331?

ARGUMENT IN OPPOSITION TO REASONS FOR GRANTING THE WRIT OF CERTIORARI

Between the time that the District Judge ruled on the question now before this Court and the Court of Appeals for the Sixth Circuit ruled on the same question, this Court rendered an opinion in the case of *Monell* v. *Department of Social Services of City of New York*, 436 U.S. 638, 98 S.Ct. 2018, 56 L.Ed.2d 618 (1978), thereby reversing in part the decision of the Court in *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). In *Monell, supra*, this Court held that municipalities were "persons" subject to suit under 42 U.S.C. §1983; however, it also held that "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under §1983 on a *respondeat superior* theory." 98 S.Ct. at 2036 (Court's emphasis).

The Sixth Circuit subsequently held that the rationale of *Monell, supra*, was conclusive on the issue of whether *respondeat superior* could be applied to fix liability on a municipality under the Fourteenth Amendment. It held that to allow the doctrine to be invoked under the Fourteenth Amendment, when it had no application under 42 U.S.C. §1983 would be incongruous. (26a)

Petitioner relies in part on a supposed conflict between the Sixth Circuit and the District of Columbia Circuit as a basis for this Court to grant the writ of certiorari. It should be noted, however, that the decision in *Dellums* v. *Powell*, 566 F.2d 216 (D.C. Cir. 1977) was rendered prior to this Court's decision in *Monell, supra*. Whether the *Dellums, supra*, court would rule the same way today is a matter of speculation subject to considerable doubt.

For example, the decision in *Dellums, supra*, not to apply §1983 principles to a *Bivens* style action was based

in part on the fact that the provisions of §1983 were not applicable to officers of the District of Columbia. 566 F.2d at 224. At the time the decision was written, the same was true of municipalities by virtue of *Monroe*. The *Dellums, supra*, court, therefore, did not take note of the legislative history of §1983. In light of this Court's reversal of *Monroe* on the issue of municipalities' liability under §1983, certainly that legislative history becomes relevant with respect to those governmental entities, while it would, perhaps, remain irrelevant to a consideration of actions in the D. C. Circuit, where officers' actions may still be shielded from §1983 liability.

It should also be noted that *Dellums, supra*, is not a case involving alleged violations of the Fourteenth Amendment, but rather of the First and Eighth Amendments. One must remember the closeness in time between the passage of the Fourteenth Amendment and Section 1 of the Civil Rights Act of 1871 (the predecessor of §1983). The symbiotic relationship between the two laws is expressed in *Monell, supra*, when this Court recognized that ". . . §1 of the Civil Rights Act simply conferred jurisdiction on the federal courts to enforce §1 of the Fourteenth Amendment. . ." 98 S.Ct. at 2031. Section 1983 represents the intent of Congress to carry out its power under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this [the Fourteenth Amendment] article."

In *Lynch* v. *Household Finance Corporation*, 405 U.S. 538, 92 S.Ct. 1113 (1972), this Court stated that:

> "Not only was §1 of the 1871 Act derived from §2 of the 1866 Act but the 1871 Act was passed for the express purpose of 'enforc[ing] the provisions of the Fourteenth Amendment'." 92 S.Ct. at 1118.

To allow recovery based on vicarious liability under the amendment, but not based on the statute enacted to enforce its provisions, would create an inexplicable paradox.

Division of opinion on the issue of *respondeat superior* liability among district courts, as cited by petitioner, is not adequate grounds for granting of the writ, and would place a formidable burden on this Court, if every such division mandated granting of the writ. Moreover, like the *Dellums* case, *supra*, all of the district court cases cited by petitioner are pre-*Monell* cases.

The only other circuit courts to rule expressly on the issue at bar ruled like the Sixth Circuit. In *Turpin* v. *Maillet*, 579 F.2d 152 (2nd Cir. *en banc* 1978) [judg. vacated and remanded for reconsideration, in light of *Monell*, 436 U.S. 658 (1978)], the Court, *en banc*, pointed out that "some courts have concluded that municipalities should be held liable for any constitutional violation committed by an employee in the course of his employment, even if not sanctioned by a policy-making entity." 579 F.2d at 166.

The Court rejected that determination because it is fundamentally inconsistent with the import of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), in that the intendment of *Bivens* is "that those directly responsible for unconstitutional behavior may be called to task for their wrongful acts." 579 F.2d at 164 and 166.

In *Turpin, supra*, the Court refused to grant an additional remedy for a single constitutional violation. Taking *Bivens, supra*, as its touchstone, the Court expressly rejected the notion that vicarious liability was a proper form of relief against a municipality, in noting that:

> ". . . Since the *sine qua non of Bivens* is the imposition of liability upon those actors who can meaningfully be termed 'culpable,' it is inappropriate to permit a recovery of damages from those who, by any standard, are innocent of wrongdoing. Courts should only create a cause of action where none exists or the need for one is demonstrated. We cannot, accordingly, ignore the fact that Congress has provided a primary remedy under §1983 against the employees themselves, and has chosen not to impose vicarious liability upon the municipality." 579 F.2d at 166.

Also in *Molina* v. *Richardson*, 578 F.2d 846 (9th Cir. 1978) (Pet. for cert. filed 10/19/78 as No. 78-665), the Court declined to follow the reasoning that a *Bivens* style action under the Fourteenth Amendment could be used to supply the *respondeat superior* liability against a municipality that §1983 does not provide according to *Monell*.

The Court in *Molina, supra*, correctly concluded that a cause of action was not constitutionally required by *Bivens* to lie against the city. Moving to the question of whether the Court should grant such a remedy, the Court found the creation of such a federal judicial remedy would be inappropriate. This decision was based on several "special factors counselling hesitation" including, respect for the proper role of Congress, which has deliberately chosen to exclude vicarious liability against municipalities from the scope of §1983.

It also included concerns of federalism and the adequacy of §1983 in light of *Monell* as adequate factors suggesting judicial deference.

As the Court noted:

> "We find it significant that *Bivens* simply does not assist as a logical springboard for the extension suggested. There, the recovery was against the individual federal officers involved, and not against their 'deep-

pocketed' employer, the United States. Thus, the true analogue to *Bivens* liability for wrongs committed by agents of a municipality is precisely that provided by section 1983." 578 F.2d at 853.

Petitioners contend that this Court need not pay heed to the doctrine of *in pari materia*, though they never offer a reason for not recognizing this well-established rule of construction, that promotes harmony and uniformity among laws. While they label the results of the doctrine as "restrictive" (petitioner's brief, p. 12), it must be noted that those results are also "consistent" with legislative enactments already governing the area. See, *Cort* v. *Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).

Like the language in §1983, the language of the Fourteenth Amendment "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Monell, supra*, 98 S.Ct. at 2036. Under the Amendment the State is forbidden to act in such a way as to "deprive" any person of life, liberty, or property without due process of law. It is only by a government's laws, policies or customs that it, as a legal entity, acts to give, receive, or deprive its citizens of these things.

This Court in *Monell, supra*, pointed out that Representative Bingham in drafting Section 1 of the Fourteenth Amendment had in mind redress for actions like the taking of private property for public use without compensation by a city. 98 S.Ct. at 2034. Such an act would involve direct action by the city in the form of the execution of government policy. By contrast, when an individual at the lowest levels of the government hierarchy, directly in opposition to all State law, policy, and custom, acts to deprive another of due process, the fact that he wears a uniform and is employed by the State should not *ipso*

facto cause his misdeeds to constitute a State deprivation and result in the State's liability. In such a case, it cannot be fairly argued that the State has acted unlawfully when the laws, policies, and customs which it stands for, and operates by, render it totally innocent. To hold otherwise is to put the integrity of the State at the mercy of every single individual employed by it who may at some point become arbitrary, capricious, vindictive, or even brutal in his actions towards another.

Petitioner criticizes *Jones* v. *McElroy*, 429 F.Supp. 848 (E.D. Pa. 1977), and *Smetanka* v. *Borough of Ambridge*, 378 F.Supp. 1366 (W.D. Pa. 1974), for not suggesting under what principles a city should be held liable for employee misconduct. The answer to their criticism was provided by this Court in *Monell, supra.*

Petitioner commends the principle of *respondeat superior* as one of "universal application", as characterized by this Court in 1852, but he fails to recognize that in 1978 this Court limited that application in *Monell* with respect to actions based on 42 U.S.C. §1983. (Petitioner's brief, p. 13) Petitioner also asserts that the doctrine is particularly appropriate in cases arising under the Fourteenth Amendment, since the police conduct is a violation only because the individual is clothed with state authority. Yet the same is true of actions based on §1983, which must be under color of state law, and where the principle of *respondeat superior* has now been firmly rejected.

It is true that there are some differences in the remedial coverage furnished by the jurisdictional statute upon which an action under the Fourteenth Amendment [28 U.S.C. §1331] is based and the one upon which an action under §1983 [28 U.S.C. §1343(3)] is based. See *Lynch, supra*, 92 S.Ct. at 1119. When viewed in the context of the liability of a municipality for the tortious con-

duct of its employees, however, their scope becomes binocular. While each statutory provision takes a slightly different view of the object under scrutiny, the resultant image of municipal liability is and must be correctly fused and consistent as seen by each statute.

CONCLUSION

For the above reasons the Writ of Certiorari prayed for by the Petitioner should be denied.

Respectfully submitted,

CLIFFORD D. PIERCE, JR.
City Attorney
Room 314 City Hall
125 North Main St.
Memphis, Tennessee 38103
Counsel for Respondents

Of Counsel:

HENRY KLEIN
Staff Attorney
Suite 3500 100 N. Main Bldg.
Memphis, Tennessee 38103

CERTIFICATE OF SERVICE

I hereby certify that I have, on this 18th day of January, 1979, forwarded three (3) copies of the foregoing brief to Mr. Jack Greenberg, Suite 2030, 10 Columbus Circle, New York, New York 10019; and Mr. Walter L. Bailey, Tenoke Building, 161 Jefferson, Memphis, Tennessee 38103, by United States Mail, postage prepaid, on the date above shown.

CLIFFORD D. PIERCE, JR.